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No. ———

FILED

MAR 24 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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MERLE W. DAMERON,
Petitioner,

v.

WASHINGTON MAGAZINE, INC.,
LARRY VAN DYNE and DANIEL RAPOPORT,
Respondents.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

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QUESTIONS PRESENTED FOR REVIEW

The court below has held that an ordinary private citizen who sues for libel may be classified as an "involuntary public figure" and may therefore be constitutionally required to prove actual malice if the defamatory news report at issue addresses a public controversy into which he has been involuntarily drawn. The questions presented for review are:

1. Whether the Court of Appeals' interpretation of the "involuntary public figure" doctrine is compatible with this Court's repeated insistence that an ordinary citizen may become a limited purpose public figure only by voluntarily engaging in purposeful activity which thereby increases the risk of media exposure and defamation.

2. Whether the lower court's interpretation of the involuntary public figure concept, first hypothesized by this Court in *Gertz v. Robert Welch, Inc.*, is overly broad and will thereby serve to resurrect the discredited *Rosenbloom* "public interest" standard for purposes of applying the actual malice standard in libel suits.*

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* Pursuant to Rule 21.1(b), petitioner states that the following parties appeared in the U.S. Court of Appeals for the District of Columbia Circuit:

Merle W. Dameron: an individual with no corporate affiliates;

Larry Van Dyne and Daniel Rapoport: individuals with no corporate affiliates; and

Washington Magazine, Inc.: a corporation with no subsidiaries or affiliates. It has a parent corporation known as Capital-Gazette Communications, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Merle W. Dameron, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit entered in this defamation action on December 24, 1985.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 779 F.2d 736 (D.C. Cir. 1985). It is reprinted in Appendix A to this petition at 1a-14a.

The opinion of the United States District Court for the District of Columbia is reported at 575 F. Supp. 1575 (1983). It is reprinted in Appendix B to this petition at 15a-19a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's entry of summary judgment against petitioner was entered on December 24, 1985. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. FIRST AMENDMENT, UNITED STATES CONSTITUTION:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. FOURTEENTH AMENDMENT, SECTION 1, UNITED STATES CONSTITUTION:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This is a libel action brought by Merle W. Dameron, petitioner herein, against Washington Magazine, Inc., publisher of *The Washingtonian* magazine, and two of its employees, Larry Van Dyne and Daniel Rapoport. The action was brought in the United States District Court for the District of Columbia where it was dismissed prior to trial on a motion for summary judgment. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's entry of summary judgment in the defendants' favor, holding that petitioner was an "involuntary public figure" who had not pleaded, and could not prove, actual malice.

The facts set out below are not in dispute. They present for resolution a clear, important and, as yet, unresolved question of substantial constitutional dimensions: namely, the proper scope and continuing validity of the so-called "involuntary public figure" doctrine.

The Petitioner

The petitioner, Merle W. Dameron, is a retired, private citizen who formerly worked as one of several air traffic controllers at Washington's Dulles Airport. RE at 2; 199.[1]

While employed in that capacity, Mr. Dameron's duties consisted of: (a) controlling airplane flight approaches, landings and enroute travel; (b) radar monitoring of aircraft positionings; and (c) conveying necessary flight and landing information to pilots and co-pilots. RE at 199. Mr. Dameron had no supervisory, managerial, or policymaking responsibilities, or direct contact with the public as an air traffic controller. *Id.*

On December 1, 1974, a TWA 727 (Flight 514) crashed into Mt. Weather, Virginia, while on approach to Dulles Airport. The crash killed 92 people. By chance, Mr. Dameron was the sole air traffic controller on duty at the time of the accident. RE at 3.

The NTSB Investigation

The circumstances surrounding the accidental crash of Flight 514 were immediately investigated by the National Transportation Safety Board ("NTSB"). In connection with this investigation, the NTSB held hearings in Arlington, Virginia from January to February, 1975. RE 134-149. Mr. Dameron testified at these hearings for approximately 1-1½ days regarding his actions as the air traffic controller controlling the approach of Flight 514. RE at 284-85.

In November, 1975, the NTSB issued its report. The report concluded that: "the probable cause of the [Mt. Weather] accident was the crew's decision to descend to 1,800 feet before the aircraft had reached the ap-

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[1] "RE" references in this petition are to the Record Excerpts relied upon by the Court of Appeals below.

proach segment where that minimum altitude applied." RE at 121. The NTSB report also concluded that contributing causes of the accident were general and long-standing confusion and misinterpretation of air traffic control terminology, deficiencies in certain radar monitoring procedures and the inadequate depiction of altitude restrictions on the approach chart. RE at 118-122. The report did not find that Mr. Dameron had been negligent or had otherwise improperly performed his air traffic controller duties.[2]

The News Story at Issue

Almost eight years later, in October, 1982, *The Washingtonian* magazine published an article entitled "A False Feeling of Security" concerning the January, 1982 crash of an Air Florida jet departing from National Airport. RE at 48-77. It was written by respondent Larry Van Dyne. In a section of that article discussing air traffic control, *The Washingtonian* published the following statement:

> Since then—despite hair-raising talk among controllers about computer malfunctions, fatigue-induced errors, and reports of "near misses" in midair—it is believed that no major crash has been caused solely by controller errors. They have been assigned partial blame in few accidents, including the 1974 crash of a TWA 727 into Mt. Weather in Virginia upon approach to Dulles (92 fatalities) . . . .

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[2] After the NTSB report issued, relatives of the pilot and co-pilot of Flight 514 filed a wrongful death action against the United States in federal district court in Virginia. Mr. Dameron testified as a witness for the government in this case. RE at 280. In a 1977 decision, the district court held that the government was not liable for the Mt. Weather crash. The court specifically held that Mr. Dameron was not negligent and had performed his air traffic controller duties properly. RE at 213 and 215-16. This decision was affirmed by the Court of Appeals for the Fourth Circuit in 1979. *Brock v. United States*, 596 F.2d 93 (4th Cir. 1979). RE at 226.

RE at 58. Respondent Daniel Rapoport had researched this portion of *The Washingtonian* article. His sole source for the above assertions implying that air traffic controllers were partially to blame for the Mt. Weather crash was the NTSB report. App. A at 4a.[3]

Soon after the article appeared, petitioner Dameron notified *The Washingtonian* that it had made a mistake. The magazine thereafter printed a correction stating that "no blame [had been] placed on individual controllers by the [National Transportation Safety] Board." RE at 231.

The Decisions Below

On April 4, 1983, Merle Dameron filed suit against *The Washingtonian* magazine in the United States District Court for the District of Columbia. RE at 1-4. He asserted that as the sole air traffic controller on duty at the time of the Mt. Weather crash, *The Washingtonian* aritcle both identified and defamed him. RE at 33. He further asserted that he was not in fact partly to blame for the 1974 Mt. Weather crash and that *The Washingtonian*'s statement to the contrary was therefore negligently false. *Id.* Lastly, he contended the article had caused him humiliation and mental anguish. *Id.* His complaint did not allege that the report had been published with actual malice. *Id.;* App. A at 5a.

After discovery was completed, the defendants filed a motion for summary judgment. The district court granted this motion on December 21, 1983 holding that *The Washingtonian* "enjoyed a conditional privilege" to publish the statement at issue because it was a fair report of a governmental proceeding under relevant District of Columbia case law. RE at 271-275; App. B at 15a-19a.[4] Because Mr. Dameron had not alleged actual

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[3] "App. A" references refer to Appendix A to this petition, which reproduces the District of Columbia Circuit's opinion below.

[4] "App. B" references are to Appendix B to this petition which contains the United States District Court's opinion below.

malice, the Court stated that the privilege could not be overcome. However, in anticipation of an appeal, the district court judge further found that Dameron was neither a public official nor a public figure and that if the fair report privilege was inapplicable there would be a question of fact as to whether the defendants had acted negligently. App. B at 16a.

On appeal, two main issues were briefed: (1) whether the fair report privilege applied; and (2) whether Merle Dameron was a public official or a limited purpose public figure. On the first issue, the District of Columbia Circuit Court disagreed with the district court's grant of summary judgment on the grounds that the defendants enjoyed a conditional privilege to publish reports of governmental proceedings. Because proper attribution is an integral element of the fair report privilege, and because the average reader of *The Washingtonian* article would have been unlikely to understand the article to be a summary of the NTSB's investigative findings, the privilege was deemed inapplicable. App. A at 7a-9a.

However, the appellate court nevertheless found alternate grounds for affirming the district court's grant of summary judgment. Drawing upon this Court's past development of the "public-figure" doctrine to identify those libel plaintiffs who must plead and prove constitutional actual malice, the Circuit Court found that "Dameron's role in a major public occurrence resulted in his becoming an involuntary, limited purpose public figure." App. A at 13a.[5] Because petitioner did not allege and admitted he could not prove that *The Washingtonian* had written the allegedly false and defamatory report with actual malice, the appeals court concluded that his suit was properly dismissed. App. A at 14a.

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[5] Because of the court's conclusion that Dameron was an involuntary, limited-purpose public figure, it did not reach the question of whether he might also be classified as a "public official." App. A at 14a.

Rationale Underlying the Circuit Court's Opinion

The appellate court's conclusion that petitioner was an "involuntary public figure" for the limited purpose of discussions of the 1974 Mt. Weather crash stemmed primarily from its reading of four of this Court's previous "public-figure" decisions: *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); and *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157 (1979).

Writing for the circuit panel, Judge Mikva noted that *Butts* had originally generated only two definitions of a "public figure": the "pervasive" or "all purpose" public figure and the more restricted "limited purpose" or "vortex" public figure. App. A at 9a-10a. The latter category he observed, consisted of individuals who had purposely thrust their personality into the "vortex" of an important public controversy. *Id.*

Judge Mikva recognized that petitioner could in no ways be viewed as a "pervasive" "all purpose" public figure: on the contrary, Dameron was described as "an ordinary citizen," who had been "completely unknown to the public before the Mt. Weather crash," and who was "neither a person of general notoriety nor a person who has with 'vigor and success' sought the public's attention." App. A at 10a.

Judge Mikva additionally concurred in the district court's holding that: "Dameron cannot fairly be said to have 'injected' himself into the [Mt. Weather] controversy." App. A at 9a. Dameron did not "desire" to be a part of the Mt. Weather crash controversy and his involvement was both "involuntary" and "relatively passive." App. A at 11a. It was only "by sheer bad luck" that he became involved at all. *Id.* Accordingly, this lack of voluntariness on Dameron's part seemed to preclude

him from being categorized as a limited purpose public figure.

Judge Mikva then declared, however, that the Court's emphasis in *Butts* on the importance of "voluntariness" in the public figure equation was "not the be-all and end-all . . . by which public-figure status is achieved." App. A at 9a. Specifically, he alluded to that portion of *Gertz v. Robert Welch, Inc.* in which this Court hypothesized that "it is possible, although difficult and rare, to become a limited-purpose public figure *involuntarily*." App. A at 11a (emphasis in original). Persons can be elevated to the status of a limited-purpose public-figure "without their consent or will," and "such," he asserted, "has been Dameron's fate." *Id.*

In Judge Mikva's view, the 1974 Mt. Weather crash "was indisputably a public controversy." *Id.* Moreover,

> As in *Gertz*, Dameron "assume[d a] special prominence in the resolution of [a] public question[]." *Gertz* at 351. He became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident. He thereby became well known to the public in this one very limited connection.

App. A at 11a-12a.

Although recognizing that two cases decided subsequent to *Gertz*, *Time, Inc. v. Firestone* and *Woltson v. Reader's Digest Association*, might "compel a different conclusion," App. A at 13a, Judge Mikva not only distinguished but relied upon each of these cases to buttress his conclusion that Dameron was an involuntary public figure. App. A at 12a-13a.

In *Firestone*, the former wife of a prominent industrialist had sued *Time* magazine for misstating the details of her well-publicized divorce proceedings and was held by this Court not to be a public figure. Specifically,

Justice Rehnquist had found that Mrs. Firestone had not "thrust herself to the forefront of any particular controversy." But according to Judge Mikva, Dameron's situation was "far removed from that of Mrs. Firestone" since an important "public controversy," existed, i.e., the 1974 Mt. Weather crash. *Id.* Therefore, for the constitutional purpose of becoming an *in*voluntary public figure, lack of voluntariness was irrelevant, so long as "a particular public controversy" existed.

In *Wolston v. Reader's Digest Association*, an individual involuntarily drawn into a public controversy in the fifties and years later falsely named as a Soviet spy in a book, was also deemed by this Court not to be a public figure. The distinction, here, Judge Mikva opined, was that whereas Wolston was defamed with respect to a controversy in which he played a tangential role, "Dameron was a *central* figure, however involuntarily, in the discrete and specific public controversy with respect to which he was allegedly defamed . . . ." App. A at 13a (emphasis added). Again, the fact that petitioner did not voluntarily thrust himself into the vortex of the Mt. Weather controversy was deemed irrelevant.

For all these reasons, Judge Mikva found petitioner to be an involuntary public figure. However, mindful that the court's rationale—which emphasized that close association with a "public controversy" alone would be sufficient to render one a limited-purpose public figure—might sweep too broadly, he concluded with an assertion that the Court's holding was actually quite limited: "The circumstances in which an involuntary public figure is created will, we are confident, continue to be few and far between." App. A at 13a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT, UNRESOLVED AND RECURRING QUESTION OF CONSTITUTIONAL LIBEL LAW CONCERNING THE PROPER SCOPE AND CONTINUING VIABILITY OF THE INVOLUNTARY PUBLIC FIGURE DOCTRINE.

The opinion below presents an important, unresolved and regularly recurring federal question concerning the proper scope and continuing viability of the so-called involuntary public figure doctrine. In revitalizing this doctrine, the court below claimed to be guided primarily by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the case wherein a class of limited purpose involuntary public figures was first hypothesized. However, the point to be emphasized is that *Gertz* dealt with a hypothetical situation, *not* with a concrete set of facts. Thus, this case may properly be viewed as one of first impression.

Moreover, the issues presented herein are particularly ripe for resolution. In the years since this Court ambiguously postulated the existence of an involuntary public figure class of libel plaintiffs, the issue has been repeatedly addressed in the federal circuits. The conflict in holdings is substantial. Further, a careful reading of *Gertz* and the subsequent public figure libel cases decided by this Court casts doubt on the doctrine's continuing viability.

A decision by this Court on the precise definition and scope of the involuntary public figure concept will resolve these conflicts, clarify this Court's previous rulings and thereby lead to greater predictability in the administration of the federal law of libel. And predictability of the law is an especially critical factor in the highly sensitive libel area.

Conversely, failure to grant review of the decision below will have several deleterious consequences. Not only will it perpetuate existing divisions on an issue

of signal importance to libel plaintiffs and defendants alike, but refusal to act may gravely impair the effective operation of the federal libel scheme established in *Gertz* by allowing the reintroduction of the discredited *Rosenbloom* "public interest" libel standard to go unchallenged.

In *Gertz*, this Court established a new constitutional framework to accommodate two important, yet conflicting values: the First Amendment's policy of encouraging "uninhibited, robust, and wide-open" debate on public issues, *New York Times v. Sullivan*, 376 U.S. 256, 270 (1964), and "[t]he legitimate state interest . . . [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341.

Gertz arrived at this accommodation by dividing the entire class of libel plaintiffs into two categories (public officials/public figures vs. private figures); and by establishing different standards of proof to govern the award of damages to plaintiffs in each category. *Id.* at 344-347.

The Court's basis for distinguishing between public and private figures and for applying the rigorous *New York Times* actual malice standard to the former category was twofold. First, the Court reasoned that private individuals are more "vulnerable" to damage and thus more "deserving" of state defamation remedies than public officials or public figures who generally possess sufficient access to effective communication channels to rebut the defamatory statements. *Id.* at 344-45.

Much more important to the Court's thinking, however, was the fact that public officials and public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," whereas private individuals have not. *Id.* When the *Gertz* Court turned its attention to describing the different classes of individuals who fit into the public figure category, it was this emphasis on voluntary action, akin to assumption of risk, that was determinative.

The *Gertz* Court delineated three classes of public figures: (1) persons famous or notorious enough to be public figures for all purposes; (2) persons otherwise not famous who had voluntarily injected themselves into particular public controversies; and (3) persons who had been involuntarily drawn into such controversies. *Id.* The court emphasized that the *New York Times* actual malice standard was properly applied to all-purpose and voluntarily limited categories because such individuals had assumed the risks of close public scrutiny. *Id.* at 344-45. However, the Court's rationale for hypothesizing the existence of the involuntary public figures class was left unexplained. Moreover, no further definitional clarification was provided as to its proper scope in subsequent rulings in this area.

Petitioner seeks review of this important policy question in order to definitively resolve these ambiguities.

A. There Is A Substantial And Irreconcilable Division Of Opinion Among The Lower Federal Courts As To The Constitutional Parameters Of The Involuntary Public Figure Doctrine.

Subsequent to this Court's decision in *Gertz*, all levels of the lower federal judiciary have repeatedly been called upon to ascertain the precise meaning and scope to be afforded the involuntary public figure class of libel plaintiffs. In light of the limited guidance *Gertz* provided, it is not surprising that a wide divergence of opinion has resulted. Thus, one commentator has catalogued at least four distinct and mutually irreconcilable judicial interpretations concerning this doctrine. *See* Note, *The Involuntary Public Figure Class of* Gertz v. Robert Welch: *Dead or Merely Dormant?*, 14 U. Mich. J.L. Ref. 71, 76-79 (1980).

One judicial view of the *Gertz* involuntary public figure doctrine is that this Court did not mean to imply the existence of a separate third class of public figures. Rather, these courts have interpreted this language to

simply suggest that not all individuals who attain public figure status have deliberately chosen to accept the risk of defamation from increased media exposure. Accordingly, in *Schultz v. Reader's Digest Association, Inc.*, 468 F. Supp. 551, 560 (E.D. Mich. 1979), the court stated:

> [A] qualitative distinction must be made regarding types of involuntariness. On the one hand, a person who engages in conduct that unintentionally or unknowingly attracts public attention might be classed as an involuntary public figure because in some sense he can be said to have assumed the risk of his own conduct. On the other hand, a person who becomes the object of public attention through no action of his own cannot be said in any real sense to have assumed the increased risk of defamation and would not therefore become a public figure.

In other words, some individuals might become "involuntary" public figures, according to these courts, in the sense that they *purposefully* and yet perhaps not *deliberately* assumed the risk of closer media scrutiny by their actions. Creation of the involuntary category of limited purpose public figures was thus simply meant to reflect the subjective unawareness as to assumption of the risk held by this class of libel plaintiffs. *Cf., Ethridge v. North Mississippi Communications, Inc.*, 460 F. Supp. 347 (N.D. Miss. 1978) (undercover drug agent held to be public figure despite covert status); *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("[T]he status of public figure *vel non* does not depend upon the desires of an individual); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1084 (3d Cir. 1985) (asserting that one cannot avoid public figure status by arguing that one did not want it).

A second view held by the courts that have considered this federal question is that the involuntary public figure class does exist and is composed exclusively of celebrities who attempt to return to anonymity but who are unable to do so because of press attention. *See, e.g., Waldbaum v. Fairchild Publications*, wherein the court stated:

> In rare instances, a celebrity may decide to abandon his prominent position in society to return to anonymity, but persistent press attention, most likely fueled by continuing public interest, may thwart his quest for privacy. In such a case, he still may be a public figure. Although he no longer is accepting the risk of defamation voluntarily, he remains able to reply to attacks through the press, which is continuing to cover him. . . . Moreover, his power and influence, due to his prominence, may continue despite his efforts to renounce publicity. Thus, his actions still, as *Gertz* put it, "invite attention and comment."

627 F.2d 1287, 1295 n.18 (D.C. Cir. 1980).[6]

The third and most prevalent interpretation of the doctrine is that it is most appropriately employed to govern libel suits initiated by otherwise private individuals who have become associated with notorious public officials or public figures. *See, e.g., Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 113 (1978) (children of Julius and Ethel Rosenberg held to be public figures because of media attention shed on children by virtue of their parents' fame); *Buchanan v. Associated Press*, 398 F. Supp. 1196, 1202 (D.D.C. 1975) (accountant whose firm had been retained by finance committee to re-elect the President "drawn into" controversy through association); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (otherwise anonymous individual held to be limited-purpose public figure because of his wife's former relationship to Elvis Presley); *Carson v. Allied News Co.*,

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[6] *Waldbaum* was discussed at length by Judge Mikva in the opinion below. App. 10a-11a. Yet his interpretation of the involuntary public figure doctrine differs significantly from that put forth in *Waldbaum*. *See infra* at 15. The District of Columbia Circuit thus stands as an example, in miniature, of the confusion engendered by *Gertz's* ambiguous reference to an involuntary public figure class of libel plaintiffs.

529 F.2d 206 (7th Cir. 1976) (wife of television entertainer held to be "part-time" public figure). This apparently is also the view of Justice White as expressed in his concurrence in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 61-62 (1971). *See also* Tribe, *American Constitutional Law*, §§ 12-13 at 643-44 (1978).

Finally, there is now the novel interpretation of the court below, which will apply the involuntary public figure class to private individuals who have been "involuntarily drawn" into "important public controversies" regardless of any assumption of the risk on their part. Under this rationale the media are provided with a blanket constitutional privilege, *i.e.*, the actual malice standard, to defame otherwise private citizens who through no fault of their own become associated with important public controversies. Because this broad category can be made applicable to almost any newsworthy event, *infra* at 22, it threatens to nullify the public figure/private citizen distinction altogether.

Additionally, a fifth judicial view of the involuntary public figure doctrine may be said to exist if one includes those courts which either openly question the doctrine's continuing validity or, similar to this Court in *Wolston v. Reader's Digest Association*, conspicuously fail to enumerate it whenever discussing the limited purpose public figure concept in general. *See, e.g., Barry v. Time, Inc.*, 10 Med. L. Rptr. 1809, 1812 n.6 (N.D. Cal. 1984); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 374 (6th Cir.), *cert. denied*, 454 U.S. 1130 (1981) (suggesting that only evidence that a libel plaintiff "knowingly exposed himself" to "[the risk of] increased media attention" will result in limited purpose public figure status).

The variety of judicial views on this issue has led to a number of striking contradictions and anomalies. For example, in *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981), a libel plaintiff who

had served on the staff of the Vice-President and had served as a deputy director of the committee to re-elect the President was not held to be a limited purpose public figure for the purposes of remarks made in the context of a Senate campaign. In contrast, an accountant to that same committee to re-elect the President was found to be such a figure. *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975).

Similarly irreconcilable are the involuntary public figure cases dealing with criminals. In *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 863 (5th Cir. 1978) the Fifth Circuit held that involvement with organized crime makes one an involuntary limited purpose public figure. However, in *Rancho La Costa, Inc. v. Superior Court (Penthouse Int'l., Ltd.)*, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *app. dismissed*, 450 U.S. 902 (1981) a different court addressing the same issue reached the opposite conclusion. *See also Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1084, n.9 (3d Cir. 1985) ("[T]o the extent a person attains public figure status by . . . notorious act, he might be considered an involuntary public figure.")

Finally and most recently one is compelled to note that a California court, has held that a former Iranian hostage who was sued for libel is not an involuntary public figure for purposes of a story relating to his seizure at the American embassy. *Plotkin v. Van Nuys Publishing Co.*, N. C 359227 (L.A. Super. Ct.) (mem. decision Feb. 25, 1986).

The incongruous results reached at all levels of the state and federal judiciary on this issue highlight the necessity for this Court to provide additional guidance.

B. Recent Decisions Of This Court Emphasizing The Importance Of Voluntariness In Making Public Figure Determinations Have Placed The Continuing Viability Of The Involuntary Public Figure Doctrine In Doubt.

Since *Gertz v. Robert Welch, Inc.* was decided in 1974, this Court has revisited the limited purpose public figure doctrine on a number of occasions. The three most prominent cases being: *Time Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). However, in their failure to mention, let alone discuss, the involuntary public figure concept, these cases have raised a serious question as to whether the federal courts are correct in continuing to recognize the concept's very existence.

In *Time, Inc. v. Firestone*, the former wife of the heir to the Firestone tire fortune sued *Time* magazine for misstating details of her divorce proceedings, and was held not to be a public figure. However, in discussing the question of whether Mrs. Firestone was a limited purpose public figure, this Court conspicuously omitted the "lack of purposeful action" and "drawn into" passages from its summary of the *Gertz* "public figure" definition, thereby suggesting that the involuntary class is not a central part of the Court's conception of public figures. *Firestone*, 424 U.S. at 453.

The Court took further pains to emphasize that although participants in some litigation may be legitimate public figures, "the majority will more likely resemble [Mrs. Firestone], *drawn into* a public forum largely against their will . . . ." *Id.* at 457 (emphasis added). As several commentators have observed, use of the phrase "drawn into" in this passage conflicts with the Court's earlier statement in *Gertz* that a person could become a public figure by being "drawn into" a public controversy.

See Note, *The Involuntary Public Figure Class* of Gertz v. Robert Welch: *Dead or Merely Dormant?*, 14 U. Mich. J.L. Ref. 71, 81 (1980); Rosen, *Media Lament—The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487, 500-502 (1980). *See also Schultz v. Reader's Digest Association*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) wherein the court, noting this aspect of the *Firestone* decision remarked: "[I]t appears to this Court that . . . *Firestone* . . . forecloses the possibility of one becoming an involuntary public figure."

Hutchinson v. Proxmire, 443 U.S. 111 (1979), also adds support to the argument that the involuntary public figure class has been abandoned. In that case, this Court similarly refused to impose public figure status on a professor whose work was publicized as an example of wasteful governmental spending. As in *Firestone*, there was no reference made to the involuntary public figure concept. *Gertz* was summarized and again viewed as having established only *two* categories of public figures. *Id.* at 134. Furthermore, although the issue of possible involuntary public figure status was not raised, it is reasonable to assume that one who received federal funds might be a likely candidate for that status. Thus, the Court's failure to discuss the issue weighs against the involuntary category's continued viability.

Finally, the Court's decision in *Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979), further creates confusion which only this Court can resolve about the continuing viability of the involuntary public figure doctrine. *Wolston* was a companion case to *Hutchinson*. There, an individual falsely named as a Soviet spy in a book written and published by the defendants was also deemed not to be a public figure. And once again, the Court made no mention in its decision of the involuntary class, referring only to the "all-purpose" and "voluntary limited-purpose" categories. *Id.* at 164. More important,

Justice Rehnquist, writing for the Court, clearly stated that:

> A private individual is not automatically transformed into a public figure by becoming involved in or associated with a matter that attracts public attention. *To accept such reasoning would in effect reestablish the doctrine advanced by the plurality opinion in Rosenbloom. . . .*

Id. at 67 (emphasis added).

Moreover, the Court cast the public figure issue solely in terms of "thrust[ing] . . . to the forefront of particular public controversies." *Id.* at 165. As Justice Blackmun noted:

> The Court seems to hold, in other words, that a person becomes a limited-issue public figure *only if* he literally or figuratively "mounts a rostrum" to advocate a particular view.

Id. at 169 (emphasis added).

Thus there is significant support in these three post-*Gertz* decisions to suggest that this Court has had second thoughts about the wisdom of creating an involuntary class of public figures. Yet the evidence remains inclusive thereby allowing lower courts to make the distinctions such as those made by the Court below, in order to keep this category not merely alive but potentially threatening to the entire *Gertz* framework. See *infra*, at 20-22. Granting this petition will enable this Court to reexamine this doctrine to clarify whether, contrary to Judge Mikva's assertion, voluntariness has indeed become the "be-all and end-all" by which public figure status is achieved. App. A at 9a.

II. THE COURT OF APPEALS' INTERPRETATION OF THE INVOLUNTARY PUBLIC FIGURE DOCTRINE WOULD REINSTATE THE DISCREDITED *ROSENBLOOM* "PUBLIC INTEREST" FOR PURPOSES OF APPLICATION OF THE ACTUAL MALICE STANDARD IN LIBEL SUITS.

The decision below purports to implement this Court's instructions in *Gertz*. However, while *Gertz* did hypothesize a class of involuntary public figures, the key element for the Court in determining public figure status was voluntary action on the part of the plaintiff that attracted public attention. This is highlighted both by the *Gertz* court's insistence that the instances of truly involuntary public figures would be "rare", and by the Court's repeated failure to mention the existence of this hypothetical class in its subsequent public figure decisions. *Supra* at 17-19.

But even more troubling than the lower court's clear departure from the holdings of *Firestone*, *Hutchinson* and *Wolston* is the fact that by broadly applying the *Gertz* involuntary public figure doctrine, the Court of Appeals decision will paradoxically lead to the reemergence of the *Rosenbloom* "public interest" test—the very test which the *Gertz* court explicitly repudiated. *Cf.*, *Wolston*, 443 U.S. at 167. To see how such a result is inevitable and will thereby lead the lower courts back into the morass of making "public interest" determinations, one need only reexamine the lower court decision.

A fair reading of the D.C. Circuit Court's ruling is that the *New York Times* actual malice standard should be applied to otherwise "private" figure libel plaintiffs whenever such plaintiffs become involved—willingly or unwillingly—in a sufficiently important "public controversy." Thus, the lower court's focus is placed squarely on the public controversy at issue rather than the plaintiff's voluntariness in seeking public attention. Accordingly, the fact that petitioner is "an ordinary citizen"

who "never sought to capitalize on the fame he achieved through [his involuntary association with] the Mt. Weather crash," App. A at 11a, was deemed irrelevant. What was important for the court was that a public controversy once existed and petitioner had become "embroiled" in it.

But in ignoring Dameron's status as a private citizen and by using the involuntary public figure concept to shift the emphasis from one's status to one's fortuitous involvement in a matter of public controversy, the lower court has repeated the principal conceptual flaw of the *Rosenbloom* decision.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of this Court briefly extended the constitutional actual malice standard to encompass all "issues of public or general concern." *Id.* at 43-44. The rationale there was the same as that of the court's below: namely, that because First Amendment protections should extend to all controversial matters of public importance, one's status is unimportant.

But *Gertz* explicitly repudiated this type of an "issue-oriented" approach to determine the ambit of the Constitution's protection. Such an approach is too heavily weighted to protecting speech at the expense of the competing reputational values at issue. Moreover Justice Powell, writing for the *Gertz* majority, flatly stated that the judiciary was institutionally incapable of making content-based determinations of the public interest. *Gertz*, 418 U.S. at 346. *Cf.*, *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting). Therefore the better way to balance the competing constitutional values was determined to be by examining whether the libel plaintiff had voluntarily relinquished, to any degree, his interest in the protection of his name. *Id.* at 344-45.

The difficulty with the approach taken below is that it requires courts to make *ad hoc* determinations as to when

an issue is so controversial that the magnitude of the event will outweigh the protection due a defamation victim who has in no way invited attention or comment. Under this rationale, not only air traffic controllers like petitioner, but virtually *any* private citizen who happens to become embroiled in a newsworthy event could be forced to surmount the actual malice standard.[7] In sum, the holding below constitutes a veiled return to the *Rosenbloom* approach, although it purports to be derived from *Gertz*.

The District of Columbia Circuit is generally regarded as the second most powerful and authoritative federal court in the nation. The fact that it has reanimated the involuntary public figure doctrine in such a way as to reintroduce *Rosenbloom* back into the *Gertz* framework, will not go unnoticed by other courts, or one must add, the media defense bar.

This reintroduction of *Rosenbloom* via *Gertz* is precisely what this Court has recently sought to preclude. *Wolston*, 443 U.S. at 167. Its return would arrest the proper development of the federal law of libel as established in *Gertz*. Moreover, unless and until this Court revisits the involuntary public figure doctrine we will continue to see hapless private citizens, who through no fault of their own are suddenly caught up in a public controversy, left with virtually no recourse if defamed. Accordingly, this Court should review the decision below.

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[7] That the lower court has used the term "public controversy" rather than "newsworthy event" is of little significance given that a court, through its own *ipse dixit*, can elevate a merely newsworthy event into a public controversy.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 24, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5056, 84-5082

MERLE W. DAMERON,

Appellant,

v.

WASHINGTON MAGAZINE, INC., *et al.*

MERLE W. DAMERON

v.

WASHINGTON MAGAZINE, INC., *et al.*,

Appellants.

Argued Nov. 29, 1984

Decided Dec. 24, 1985

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-01248)

Before ROBINSON, Chief Judge, WRIGHT and MIKVA, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge.

Plaintiff Merle Dameron appeals from the district court's grant of summary judgment to the defendant in this defamation action. We agree with the district court's

conclusion that the alleged libel was protected, but differ on the basis for such protection. The district court found that the defendants' statements about Dameron derived from an official report of a government proceeding. We do not believe the official report privilege applies in the circumstances of this case. However, we find that Dameron's role in a major public occurrence resulted in his becoming an involuntary, limited-purpose public figure. Under the controlling precedents, this status also forms a basis for protection, at least in the absence of actual malice by the alleged defamer. Accordingly, we affirm the court's grant of summary judgment.

I. BACKGROUND

This case arises from *The Washingtonian* magazine's publication in October 1982 of a lengthy article entitled "The Inside Story of the Crash of Air Florida's Flight 90: A False Feeling of Security." As the title suggests, the article was primarily a dramatic account of a much-publicized 1982 airplane crash in Washington, D.C. (replete with details of what the doomed passengers said to loved ones before leaving home for the airport, what jokes were exchanged in the cockpit before take-off, and so on).

Interwoven with the narrative account of the crash of Flight 90 were a number of sidebars that reported on aviation safety and air crashes in general. These reports included "How Dangerous Is It to Fly in Bad Weather?" and "Jet Airliners Are Almost Perfect Machines Until . . . ." The present suit is based on a two-sentence paragraph on the eleventh page of the article in a short sidebar entitled "Is National Airport an Accident Waiting to Happen?"

This section detailed safety problems specific to Washington's National Airport—the unusually large number of flights daily, its excessively short runways, the re-

quirement that pilots avoid the air space around the White House—but concluded that the FAA had taken a number of special precautions with respect to National and that National's safety record was good. The sidebar concluded with a few paragraphs designed to put National's problems in context. The report noted that in recent years airport facilities have very rarely placed any role in crashes. ("[A]irport inadequacies were partially to blame in only 6 percent of all fatal accidents.") The article also reported that the air-traffic-control system is rarely to blame in accidents. The section explained that in 1956, inadequate air-traffic control caused a major in-air crash over the Grand Canyon, and that this debacle resulted in the FAA's creation and the present air-traffic-control system. The section concluded with the following two sentences:

> Since then—despite hair-raising talk among controllers about computer malfunctions, fatigue-induced errors, and reports of "near misses" in mid-air—it is believed that no major crash has been caused solely by controller errors. They have been assigned partial blame in a few accidents, including the 1974 crash of a TWA 727 into Mt. Weather in Virginia upon approach to Dulles (92 fatalities), the 1977 Southern Airways crash in Georgia, and the 1978 collision of a Pacific Southwest Airlines jet with a light plane over San Diego (142 fatalities).

Plaintiff Merle Dameron was the sole air traffic controller on duty at Dulles on the day the TWA plane crashed into Mt. Weather in 1974. He contends that he was not in fact to blame for the accident, that he was never found blameworthy, and that he was wholly exonerated by a federal district court, which dismissed tort claims brought against the government on the theory of controller negligence. Dameron asserts that *The Washingtonian's* statement that he was partly to blame for the death of 92 people libels him—that the statement is

false, brings him into disrepute, and has caused him humiliation and mental anguish. He does not allege malice.

It appears that the researcher for this report (defendant Daniel Rapoport) had only one source for his information on the Mt. Weather crash: a 1974 National Transportation Safety Board ("NTSB") accident report. *See National Transportation Safety Board Aircraft Accident Report: Trans World Airlines, Inc., Boeing 727-231 N54320, Berryville, Virginia, December 1, 1974, Report No. NTSB-AAR-75-16, reprinted in* Record Excerpts ("R.E.") at 79-133. In preparing material for the article's author, Rapoport summarized the NTSB report by stating that the Mt. Weather crash was an incident in which "air control failures" were "one of the causes or a contributing factor." Exhibit H, *reprinted in* R.E. at 232. When the article's author (defendant Larry Van Dyne) incorporated this material in the article, he made what he apparently thought was a purely stylistic change and wrote that the *controllers* had been partly to blame. Rapoport subsequently edited the article but did not object to the change.

Shortly after the article appeared, Dameron notified *The Washingtonian* that it had made a mistake, and the magazine printed a correction. Subsequently, Dameron filed suit in District of Columbia Superior Court. The defendants—the magazine (Washington Magazine, Inc. publishes *The Washingtonian*), Van Dyne, and Rapoport —removed the case to federal court. (A fourth defendant, another researcher, was dismissed from the suit based on *The Washingtonian's* assertion that he had not worked on the challenged section of the article.) The defendants now contend that they printed the correction only in an effort to appease Dameron and not out of any belief they had made an error. They assert that the statement printed is substantially, if not precisely, accurate.

The defendants moved for summary judgment on a variety of grounds, including the fair report privilege, the substantial truth of the statement, and the theory that the plaintiff was both a public official and a public figure and that consequently his failure to allege actual malice rendered his suit legally deficient. The district judge granted the defendants' motion. He found that the allegedly libelous statement was protected by the common law conditional privilege for press reports of government proceedings. *See Dameron v. Washington Magazine, Inc.*, 575 F.Supp. 1575 (D.D.C. 1983). In apparent anticipation of an appeal, the judge further found that Dameron was neither a public figure nor a public official and that if the report privilege did not apply there would be a question of fact as to whether the defendants had acted negligently. *See id.* at 1576-77 & n.1. We turn now to examine the basis of the district court's decision and the doctrine that in fact shields the defendants from liability.

II. The Fair Report Privilege

The district court's grant of summary judgment was predicated on the conclusion that "the defendants enjoyed a conditional privilege to publish reports of governmental proceedings." *Dameron*, 575 F.Supp. at 1577. There is no question that, as a matter of District of Columbia law, publications do enjoy a conditional fair report privilege. *See, e.g., Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-90 (D.C.App.1980), *cert. denied*, 451 U.S. 989, 101 S.Ct. 2327, 68 L.Ed.2d 848 (1981); *see also* Restatement (Second) of Torts § 611. However, the district judge erred in concluding that the privilege applied to the facts of this case. The conditional immunity that applies to the publication of fair and accurate reports of official proceedings is an exception to the common law rule that one who repeats or republishes a defamation uttered by another "adopts"

it as his own. " 'The basis of the privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings.' " *Bufalino v. Associated Press*, 692 F.2d 266, 271 (2d Cir.1982), *cert. denied*, 462 U.S. 1111, 103 S.Ct. 2463, 77 L.Ed.2d 1340 (1983) (quoting RESTATEMENT (SECOND) OF TORTS § 611 comment *a*). The availability of the privilege encourages the media to disseminate official records—whether verbatim or in fair summaries—without fear of liability for any false, defamatory material that they might contain. *Id.*

The privilege's underlying purpose—encouraging the dissemination of fair and accurate reports—also suggests a natural limit to its application. Thus, if the reports are " 'garbled or fragmentary to the point where a false imputation is made about the plaintiff which would not be present had a full and accurate report been made,' " *Curtis Publishing Co. v. Vaughn*, 278 F.2d 23, 29 (D.C.Cir.), *cert. denied*, 364 U.S. 822, 81 S.Ct. 57, 5 L.Ed.2d 51 (1960), (quoting HARPER & JAMES, TORTS 432-33 (1956)), or if the reports are otherwise unfair or inaccurate, the privilege does not apply and the publisher is subject to liability. The privilege is similarly unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings. Thus, the Second Circuit has ruled that the privilege "should not be interpreted to protect unattributed, defamatory statements supported after-the-fact through a frantic search of official records," *Bufalino*, 692 F.2d at 271; and the Seventh Circuit has observed that the privilege is not properly applicable where the government record is

"merely part of one's research." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 536 (7th Cir.1982), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983). *See also Phillips*, 424 A.2d at 89 ("two major hurdles in the privilege . . . [1] fair and accurate report[ing] . . . [and 2] proper attribution").

These conclusions flow readily from an understanding that the intended beneficiary of the privilege is the public, not the press. The privilege is not simply a convenient means for shielding the media from tort liability. Rather, the privilege springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government—even if some of that is defamatory. The public's strong interest in keeping abreast of public affairs, however, is not served by reports that are so minimally related to governmental proceedings that the reader would not realize that any governmental report or proceeding was being described. Nor are such interests served by inaccurate or faithless summaries of such reports.

The present situation seems to us to fall outside the scope of the privilege carved out in D.C. law. The challenged passage is part of a very brief factual piece about safety at National Airport, which in turn is part of a larger inquiry into the circumstances surrounding the crash of Flight 90. Although these topics are certainly of interest to the public, they do not relate directly to governmental proceedings. Nor is the specific reference to the Mt. Weather crash tied to any particular governmental report or proceeding. The defendants have argued that their reference to the Mt. Weather crash should qualify for the privilege as a concise summary of the official conclusions of the NTSB, as laid out in its report of the incident. We cannot agree. There are many instances where reliance on an NTSB report would immunize an article—for example, in a news story contemporaneously reporting the release of the NTSB's

report—but this is not one of them. The challenged assertion is simply offered as historical fact without any indication of its source. Neither the particular sentence in which the alleged defamation appears, nor the sidebar as a whole mentions the NTSB, and nothing in the piece indicates that the statement is intended as a summary of the NTSB's official report. Although the principal article on the Air Florida crash does refer a number of times to the NTSB, we do not think these references are sufficient to indicate that the part of the sidebar at issue was summarizing conclusions of the NTSB—the two pieces are simply too unrelated, the connection between the references to the NTSB in the one and the allegedly implicit references to the NTSB in the other are simply too remote. In short, nothing in the article gives the reader any reason to believe that the allegedly defamatory statement is intended as a summary of an NTSB finding. Rather, the reader is left with the impression that the conclusion is that of the article's author based on his own research—which may or may not have included government reports. Had the author attributed the report to its source, the reader would know that he was simply being informed of the NTSB's view and could then evaluate the statement accordingly. The defamatory potential of an unattributed statement of what is apparently an accepted fact presents a far different situation.

We also reject the suggestion that the researcher's *actual* reliance on the NTSB's report is sufficient to qualify the resulting statement for the privilege. We think this is an example of the government report being "*merely* part of one's research" and that such a showing, although perhaps tending to demonstrate good faith, is insufficient to establish an entitlement to the protection of this particular libel defense. Allowing mere reliance to suffice would in no way advance the underlying purposes of the exception. Consequently, we conclude

that the fair report privilege is inapplicable. Our resolution of this issue renders it unnecessary to decide whether the statement, if properly attributed, would have satisfied the additional requirements of fairness and accuracy.

III. The Public Figure Doctrine

The defendants also argue that the grant of summary judgment should be affirmed because Dameron is a "public figure" (as distinguished from a "public official") and consequently cannot prevail absent proof of malice. Whether the plaintiff is a public figure is a question of law to be resolved by the court. *See Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 n. 12 (D.C. Cir.), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed. 2d 128 (1980). Here, the district judge ruled that Dameron was not a public figure. It is true, as the district court held, that Dameron can not fairly be said to have "injected" himself into the controversy. This one factor, however, is not the be-all and end-all of public figure status. Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person. We conclude that Dameron did become an *involuntary* public figure for the limited purpose of discussions of the Mt. Weather crash.

The public-figure doctrine originated in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In that case the Supreme Court added "public figures" to the category of plaintiffs who must plead and prove actual malice to recover in a libel action. The Court indicated that public figure status could be attained "by position alone" or "by . . . purposeful activity amounting to a thrusting of [one's] personality into the 'vortex' of an important public controversy," *id.* at

155, 87 S.Ct. at 1991, and that such a person normally "commanded sufficient continuing public interest and had sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., dissenting)).

As the public figure doctrine has developed, a distinction has grown up between general and limited-purpose public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52, 94 S.Ct. 2997, 3012-13, 41 L.Ed.2d 789 (1974). In *Waldbaum* we noted that "[f]ew people . . . attain the general notoriety that would make them public figures for all purposes." *Id.* at 1296. Dameron is neither a person of general notoriety nor a person who has with "vigor and success" sought the public's attention. *Cf. Gertz*, 418 U.S. at 342, 94 S.Ct. at 3008. He is an ordinary citizen who was completely unknown to the public before the Mt. Weather crash, never sought to capitalize on the fame he achieved through the Mt. Weather crash, and never acquired any notoriety apart from the crash. Dameron is not by any means, therefore, a general purpose public figure. However, we think the public-figure doctrine, fairly applied to the facts of this case, encompasses Mr. Dameron and raises him, involuntarily, to the status of limited-purpose public figure.

In *Waldbaum* this court set out a three-part framework for analyzing whether someone has become a limited-purpose public figure. Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff's involvement in the controversy. *See Waldbaum* at 1296-98. Central to the second prong of the *Waldbaum* analysis is an inquiry into the plaintiff's voluntary actions that have caused him to become embroiled in a public controversy. *See also Gertz*, 418 U.S.,

at 345, 94 S.Ct. at 3009 ("those classed as public figures have thrust themselves to the forefront of particular public controversies"). This analysis clearly must be modified somewhat to accommodate the possibility of a potentially *involuntary* limited-purpose public figure that is presented here. We think, however, that the facts here satisfy the Supreme Court's definition of a public figure and an appropriately modified *Waldbaum* inquiry. There was indisputably a public controversy here. Nor can it be doubted that the alleged defamation was germane to the question of controller responsibility for air safety in general and the Mt. Weather crash in particular. There is no question that Dameron played a central, albeit involuntary, role in this controversy. Thus, it only remains to inquire whether Dameron's relatively passive involvement in this controversy suffices to anyway qualify him as a public figure.

As we have noted above, the *Waldbaum* framework, and its second prong's requirement of activity and injection, provides the primary and most frequent route to limited-purpose public figure status. Nevertheless, the Supreme Court has recognized that it is possible, although difficult and rare, to become a limited-purpose public figure *involuntarily*. In *Gertz* the Supreme Court noted that it is "possible to become a public figure through no purposeful action of [one's] own" although it added that "the instances of *truly* involuntary public figures must be exceedingly rare." *Id.* at 345, 94 S.Ct. at 3009 (emphasis added). We think that within the very narrow framework represented by the facts of this case, such has been Dameron's fate. By sheer bad luck, Dameron happened to be the controller on duty at the time of the Mt. Weather crash. As in *Gertz*, Dameron "assume[d a] special prominence in the resolution of [a] public question[]." *Gertz* at 351, 94 S. Ct. at 3012. He became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident. He thereby became well known to

the public in this one very limited connection. The numerous press reports on the Mt. Weather crash introduced by the defendants in their motion for summary judgment amply demonstrate this. Dameron's name and likeness were often used in these reports. *See* R.E. at 134-49 (reproducing articles from The Washington Post, The Star-News, UPI and the PATCO Newsletter). It was in that same very limited connection that *The Washingtonian's* brief and oblique reference to him surfaced years later.

Paradoxically, the magazine article never mentions Dameron's name or other identifying characteristics. If Dameron had not been previously linked with accounts of the tragedy, no magazine reader could tie the alleged defamation to Dameron. Indeed, it was partly *because* of the defendant's public notoriety that he was identifiable at all from the oblique reference in *The Washingtonian.*

There is a marked contrast between the controlling facts of this case and the facts of *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), a case Dameron claims shows that he was not a public figure. Indeed, *Firestone* butresses [sic] our conclusion that Dameron is a public figure for the limited purpose of discussion of the Mt. Weather crash. In *Firestone* the scion of a prominent family of industrialists was sued for divorce. The charges and countercharges in the suit were sensational and the press displayed a great deal of interest in the proceedings. The Court, however, declined to find Mrs. Firestone even a limited-purpose public figure merely because of her much-publicized divorce trial. The Court found that Mrs. Firestone's resort to the judicial process to arrange her marital affairs was, for all practical purposes, involuntary and that the controversy, if any, over her marriage and divorce was a private one. *Id.* at 454-55, 96 S.Ct. at 965-66. The Court said that "even though the marital difficulties of extremely wealthy

individuals may be of interest to some portions of the reading public" a divorce proceeding was not a public controversy. *Id.* at 454, 96 S.Ct. at 965. That is, public interest in a controversy does not make a public controversy. The newsworthiness of an event is not the measuring stick for identifying public controversy. Nor is a voyeuristic interest in someone's private affairs an appropriate substitute. Dameron's situation, however, is far removed from that of Mrs. Firestone. Dameron was at the center of a controversy involving the loss of many lives in a mishap involving a public carrier. At issue was the management of a program administered by the FAA, an arm of the government. Another governmental agency —the NTSB—conducted an extensive, public investigation into the events surrounding the Mt. Weather Crash. Dameron appeared at these hearings and testified for many hours about his role in the crash. The hearings, and Dameron's role in them, were widely publicized. We think that, like it or not, Dameron was embroiled in a public controversy.

Nor does *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), compel a different conclusion. Dameron was a central figure, however involuntarily, in the discrete and specific public controversy with respect to which he was allegedly defamed—the controversy over the cause of the Mt. Weather crash. Wolston, by contrast, was not defamed with respect to the controversy in which he played a central role—his refusal to testify before a grand jury—but rather with respect to a controversy in which he played a role that was at most tangential—the investigation of Soviet espionage in general. *Id.* at 167, 99 S.Ct. at 2707.

We therefore conclude that plaintiff was an involuntary public figure for the very limited purpose of discussion of the Mt. Weather crash. We pause to emphasize, however, the limited scope of our holding. The circumstances in which an involuntary public figure is created will, we are confident, continue to be few and far between.

Because plaintiff himself contends that he is still known to the public in connection with the Mt. Weather crash and would be immediately recognized as the target of *The Washingtonian's* reference even without the use of his name, we need not consider the question whether mere lapse of time would free plaintiff from his involuntary public figure status. And because of our disposition of this issue, we need not reach the question whether the allegedly defamatory statement ought to have been ruled true as a matter of law.

The defendants have also argued to this court that the grant of summary judgment should be affirmed on the alternate ground that Dameron is a public official and therefore must prove actual malice, which he admits he cannot do, and which he did not allege. Because of our conclusion that Dameron was an involuntary, limited-purpose public figure, we need not reach this question.

Conclusion

We conclude that the district judge erred in holding the fair report privilege applicable to this case, but affirm the district court's entry of summary judgment for the defendants on the basis of our finding that plaintiff was an involuntary public figure, and plaintiff's admission that he has not pleaded and cannot prove actual malice.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 83-1248

MERLE W. DAMERON,
Plaintiff,

v.

WASHINGTON MAGAZINE, INC., *et al.*,
Defendants.

Dec. 21, 1983

OPINION

HAROLD H. GREENE, District Judge.

This is a libel action. As part of a story on the ill-fated Air Florida flight which crashed into a bridge over the Potomac, *Washingtonian* magazine wrote an article dealing in a general vein with airplane crashes and air safety. As part of that article, the magazine published this statement:

> Since then—despite hair-raising talk among controllers about computer malfunctions, fatigue-induced errors, and reports of "near misses" in midair —it is believed that no major crash has been caused solely by controller errors. They have been assigned partial blame in a few accidents, including the 1974 crash of a TWA 727 into Mt. Weather in Virginia upon approach to Dulles (92 fatalities) . . . .

Plaintiff was the sole air traffic controller on duty responsible for the approach of the TWA 727 (Flight 514) which crashed into Mt. Weather. He claimed that the language referred to above was false and defamatory and he sued for libel. Presently pending before the Court is defendants' motion for summary judgment.

A number of defenses are presented as part of the motion. Although it is not necessary, in view of the Court's disposition of the motion, to make a definitive decision on these matters,[1] in the Court's view plaintiff is not a public figure[2] or a public official,[3] and the Court also concludes that, if a conditional privilege were not applicable (see *infra*), there would be an issue of fact on the question whether defendants acted negligently. The Court does find, however, that defendants enjoyed a conditional privilege to publish reports of governmental proceedings, and that since there is no claim of malice, their publication of the story in question does not expose them to liability.

A publication has a conditional privilege to publish reports of governmental proceedings. See *Phillips v. The Evening Star Newspaper Company*, 424 A.2d 78 (D.C.

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[1] The Court's views are recorded, however, in the event that there is an appeal.

[2] *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Arctic Co. Ltd. v. Laudoun* [sic] *Times Mirror*, 624 F.2d 518 (4th Cir. 1980); *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632, 637 (1981); see generally, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Waldbaum v. Fairchild Publications Inc.*, 627 F.2d 1287 (D.C. Cir. 1980).

[3] *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981); see generally *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). Contrary to defendants' assertion, not every individual performing work which "citizens have entrusted to government" (Memorandum at 12) is a public official within the meaning of the defamation laws.

App. 1980); Eldredge, *The Law of Defamation* 419-27 (1978); Restatement (Second) of Torts § 611 (1976). This privilege may be overcome only either by a showing of actual malice,[4] which, of course, is not alleged here, or by a demonstration that the account does not constitute a fair and accurate report of the proceedings.

The National Transportation Safety Board investigated the Mt. Weather crash and it published an official report thereon in November 1975. The Board's three-member majority stated that the crash was caused primarily by the decision of the TWA 514 to descend to a low altitude, but it further found that the issuance of the approach clearance [by the air traffic controller] when the flight was 44 miles from the airport on an unpublished route without clearly defined minimum altitudes was one of three contributing factors. Report at 1-2. The two dissenters were even more emphatic. In their view, substantial responsibility for the accident had to be assigned to the controller's misreading of the appropriate regulations.[5] The *Washingtonian* article, of course, stated no more than that controller error had been "assigned partial blame" for this particular tragedy, and it thus accurately reported the conclusions of the Board.

Plaintiff concedes that a "fair comment" or "record" privilege immunizes a publication when it constitutes a "fair and substantially correct statement of the record." Memorandum at 25; see *Alexandria Gazette Corp. v. West*, 198 Va. 154, 93 S.E.2d 274, 279 (1956). However, he claims that (1) the proceeding before the National Transportation Board was not identified as such in the article, and (2) the U.S. District Court for the District of Virginia has held that plaintiff had not been negli-

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[4] *Phillips v. Evening Star, supra*, 424 A.2d at 87.

[5] Report at 45-52. At deposition, plaintiff conceded that his actions were, in the opinion of the National Transportation Safety Board, a contributing cause of the accident.

gent and had performed properly his air controller duties in connection with the 1974 crash.[6]

The name of the governmental body which found plaintiff partially to blame for the crash and the precise designation of the proceeding in which such finding was made are irrelevant to the privilege and to the reasons supporting it. As long as there was such a body with the requisite authority (see *infra*) and such a proceeding, it makes no difference whether they are identified in the article.

As for the District Court decision, it was rendered in an unrelated, wrongful death action brought by relatives of the pilot and co-pilot of Flight 514. Defendants' conditional privilege is not defeated because there was collateral litigation in which a court made a finding at odds with that of the governmental body whose proceedings defendants accurately reported.[7]

The National Transportation Safety Board is an agency established by the Congress for the task of ascertaining the causes of transportation disasters, particularly in the air traffic field, and it publicizes its findings broadly in order to foster public understanding of safety issues.[8] Discussion and comment regarding those findings is in the public interest. Such discussion would be seriously jeopardized if a publication were subjected to the hazards of a defamation action upon reporting the Board's findings merely because another tribunal, faced with different issues and operating under different stand-

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[6] That decision was affirmed by the U.S. Court of Appeals for the Fourth Circuit.

[7] It is not clear whether defendants could even reasonably have found an unpublished opinion of the District Court for the Eastern District of Virginia captioned under names not directly related to the NTSB investigation.

[8] Compare *Phillips v. Evening Star, supra,* 424 A.2d at 89.

ards of proof, came to a conclusion at odds with that reached by the Board.[9]

Plaintiff's underlying claim in opposition to the defense of publication of a governmental proceeding—as to the other defenses—is that factual disputes exist and that summary judgment should therefore be considered only gingerly. It is not clear what factual dispute there is regarding the defense of fair reporting of a governmental finding. Plaintiff's only point in that regard appears to be that fact-finders may differ as to whether the statement in the *Washingtonian* was a fair and accurate statement of the record of the NTSB report. Summary judgment is more appropriately granted in defamation actions than in other circumstances in order that the harassment that might otherwise chill essential First Amendment freedoms may be avoided. See, *e.g.*, *Washington Post v. Keogh*, 365 F.2d 965, 968 (D.C.Cir. 1966); *Nader v. de Toledano*, 408 A.2d 31, 43 (D.C. App. 1979). The language of the report of the NTSB so clearly supports the statement in the *Washingtonian* that air traffic controllers[10] were partially responsible for the crash on Mt. Weather that it would be inconsistent with the principles discussed above to require the publication to undergo a trial.

Defendants' motion for summary judgment will be granted.

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[9] The District Court's decision in the action brought by the pilot and co-pilot did not extinguish the Board's conclusions. Plaintiff's argument would be more compelling if a body having jurisdiction, such as a court on direct review from the NTSB (49 U.S.C. § 1655), had reversed the Board's findings.

[10] It is to be noted that plaintiff was not named in the article or otherwise identified in any way.

Supreme Court, U.S.
FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERLE W. DAMERON,
Petitioner,

v.

WASHINGTON MAGAZINE, INC.,
LARRY VAN DYNE and DANIEL RAPOPORT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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April 30, 1986

QUESTIONS PRESENTED FOR REVIEW

The court below held that an individual who plays a significant and central role in an important public controversy may be a "limited purpose public figure" constitutionally required to prove actual malice. There are three questions presented for review:*

1. Whether an individual who plays a significant and central role in an important public controversy may be a limited purpose public figure.

2. Whether a public servant holding a position of critical importance to the public is a public official.

3. Whether there is sufficient evidence to permit a jury to find that respondents acted with fault.

*Respondents respectfully reserve the right to argue Questions 2 and 3 in the event certiorari is granted on the first Question.

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, respondents state that the following parties appeared in the United States Court of Appeals for the District of Columbia Circuit:

Merle W. Dameron: an individual with no corporate affiliates;

Larry Van Dyne and Daniel Rapoport: individuals with no corporate affiliates; and,

Washington Magazine, Inc.: a corporation with no subsidiaries or affiliates. It has a parent corporation known as Capital-Gazette Communications, Inc. A substantial minority shareholder of Capital-Gazette Communications, Inc., is Landmark Communications, Inc.

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NO. 85-1569

IN THE

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OCTOBER TERM, 1985

MERLE W. DAMERON,

Petitioner,

v.

WASHINGTON MAGAZINE, INC.,
LARRY VAN DYNE and DANIEL RAPOPORT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Washington Magazine, Inc., Larry Van Dyne, and Daniel Rapoport, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioner, Merle Dameron, brought this action to recover damages for a statement made in an article published in the October, 1982 issue of *The Washingtonian* magazine. The article, "A False Feeling of Security," focused on the January, 1982 crash of an Air Florida jet in Washington, D.C., and upon issues pertaining to airline safety in general.

Dameron filed suit in April of 1983. Respondents later moved for summary judgment, raising the questions presented for review here as well as other issues. On December 21, 1983, Judge Harold H. Greene granted respondents' motion and dismissed the action.

Dameron appealed to the United States Court of Appeals for the District of Columbia Circuit.[1] That court affirmed, holding that he was a "limited purpose public figure" who must plead actual malice.

Although the facts presented by Dameron's complaint are unusual, the legal questions involved are not. The opinion below follows faithfully the well-settled principles set forth by this Court on the public figure doctrine. Moreover, because those principles are well-settled, neither state nor federal courts need further guidance in this area.

FACTS

On January 13, 1982, Air Florida Flight 90 lifted off a runway at Washington's National Airport and crashed a few seconds later into a bridge over the Potomac River, killing 74 persons. The catastrophe raised many significant questions, both about the accident itself and about airline safety generally. Thus, in the spring of 1982, respondents decided

[1]The appeal presented a number of questions—including those raised here—and not just the two issues petitioner claims were raised. The defenses raised in the courts below, in addition to those raised here, included truth and the privilege to report on official proceedings.

to research and write an article about the crash of Flight 90. The article would have a double focus. First, it would study the crash, its causes, and the individuals involved. Second, it would examine issues pertaining to airline safety, including those factors which had often contributed to commercial airline crashes. RE at 334–35.[2]

Research began in April or May and continued throughout the summer until the article was finished in September. RE at 300. The primary responsibility for the research regarding issues on airline safety rested with Daniel Rapoport. RE at 301. He had written previously on airline safety, and he had been an air traffic controller in the Navy. RE at 310, 313.

Rapoport extensively researched the Air Florida crash. He read the transcripts of the hearings and staff reports in addition to reading approximately 30 articles. RE at 301–03, 317. He also read many articles and books about commercial aviation safety. RE at 302, 307, 311, 317, and 326. In addition, he read as many as 20 National Transportation Safety Board (NTSB) reports regarding other crashes. RE at 311, 326. Among the NTSB reports Rapoport reviewed was the one concerning the 1974 crash of a TWA 727 into Mt. Weather. RE at 319. Respondent Larry Van Dyne also devoted considerable effort to research prior to writing. RE at 338–39.

Based upon their intensive research, respondents wrote the article entitled "A False Feeling of Security" which appeared in the October, 1982 issue of *The Washingtonian*. The article spanned thirty pages and 28,000 words. RE at 48–77. In addition to reconstructing the Air Florida crash, the article discussed a number of serious safety issues. These included pilot errors, flaws in airplane design and construction, the safety of National Airport, and the reliability of the air traffic control system at National and elsewhere. In this last section, respondents published the statement which is the subject of this litigation (RE at 58):

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[2]"RE" references are to the Record Excerpts before the Court of Appeals.

> Since then—despite hair-raising talk among controllers about computer malfunctions, fatigue-induced errors, and reports of "near misses" in midair—it is believed that no major crash has been caused solely by controller errors. They have been assigned partial blame in a few accidents, including the 1974 crash of a TWA 727 into Mt. Weather in Virginia upon approach to Dulles (92 fatalities) . . . .

Dameron was employed at the time of the accident by the Federal Aviation Administration as an air traffic controller at Dulles Airport. He was the sole controller on duty responsible for the approach of the TWA 727 which crashed into Mt. Weather. RE at 2. He alleges that the language complained of was understood by readers of *The Washingtonian* to mean that his errors were "partially to blame for the crash . . . ." RE at 3.

Dameron testified at length before the NTSB regarding his actions as the controller responsible for Flight 514. RE at 280–81. The NTSB issued a report that was reviewed by respondents with regard to the Mt. Weather crash. RE at 319–20. Although petitioner would have it otherwise in his statement of the case, a majority of the NTSB found that controller error contributed to the accident.[3] It stated that a contributing factor was:

> The issuance of the approach clearance when the flight was 44 miles from the airport on an unpublished route without clearly defined minimum altitudes . . . .

RE at 83–84, 122.

Dameron admits that he issued the approach clearance referred to and, although he now claims differently, admitted at deposition that his actions were, in the opinion of the Safety Board, a contributing cause of the accident:

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[3] As Judge Greene noted, "[t]he two dissenters were even more emphatic. In their view, substantial responsibility for the accident had to be assigned to the controller's misreading of the appropriate regulations." *Dameron v. Washington Magazine, Inc.*, 575 F. Supp. 1575, 1577 (D.D.C. 1983). Thus, in Judge Greene's view, *all of the NTSB panel* assigned "partial blame" to the controller in the Mt. Weather tragedy; and, therefore, the article "accurately reported the conclusions of the Board." *Id.* (emphasis supplied).

> Q. And isn't it also a fact that the same Board came to the second contributing factor, the fact that you issued an approach clearance when the flight was 44 miles from the airport on an unpublished route without clearly defined minimum altitudes?
>
> A. Yes.
>
> Q. Doesn't that mean, right or wrong, we will not debate, but doesn't it mean that, for whatever reason, for whatever purpose, the National Transportation Safety Board stated that a contributing cause of the accident pertained to you, to your act of either omission or commission?
>
> A. In their opinion, yes.

RE at 296-99. The Board further indicated that neither the pilots nor the controllers fully comprehended the seriousness of their omissions, that neither exercised the highest degree of care and safety, and that the accident could have been avoided had they done so:

> The Board believes that the clearance, under the circumstances, should have included an altitude restriction until the aircraft could reach a segment of the published approach procedure or the issuance of the approach clearance should have been deferred until the flight reached such segment. Therefore, the Safety Board concludes that *the clearance was inadequate and its issuance and acceptance was the result of a misunderstanding between the pilot and the controller.*
>
> * * * *
>
> Whereas the air carriers and the pilots are expected to perform their services with the *highest degree of care and safety, this same high level of performance must be expected from the management of the air traffic control system and the controller.* The instant case provides a classic and tragic example of a pilot and controller who did not fully comprehend the seriousness of the issuance and acceptance of a clearance which was not precise or definitive. The pilot should question a clearance which leaves any doubt as to what course of action should be followed. *The Board also believes that it is*

> *incumbent upon the controller to ascertain beyond a doubt that the terminology of a clearance conveys the intent to the pilot and to question the pilot if there is any doubt that he has understood it and is initiating actions compatible with the intent of the clearance.*

RE at 114, 117–18 (emphasis supplied).

Despite all of that evidence, petitioner now contends that the NTSB did not assign partial blame to controller errors. He also claims that, although the article does not name him, the public recognized him as the person referred to in *The Washingtonian* because of the substantial media coverage of the crash. RE at 282–83. By his own admission, therefore, he is a limited purpose public figure.

The unique facts involved, the uniform body of law on the limited purpose public figure doctrine, the vitality of the doctrine, and the important goals it serves obviate any need for a decision by this Court on the issue of whether Merle Dameron is a limited purpose public figure. Moreover, review is unnecessary because Dameron is a public official, and because he failed to produce any evidence from which a jury could find that respondents acted with fault.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NO NEED FOR ADDITIONAL GUIDANCE BECAUSE THE CLEAR GUIDELINES OF THE LIMITED PURPOSE PUBLIC FIGURE DOCTRINE ARE APPLIED CONSISTENTLY.

The opinion below faithfully follows the clear and well-established guidelines of the limited purpose public figure doctrine. These long-standing guidelines have produced a uniform body of law accurately reflecting the important goals of the doctrine. As a result, substantial predictability now exists in this area of libel despite the many different fact settings which confront the courts.

Heightened media protection is warranted in order to encourage "uninhibited, robust, and wide-open" debate on public issues. *New York Times v. Sullivan*, 376 U.S. 256, 270 (1964). Later decisions extend this protection to discussions of public figures involved in important public controversies. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The goal of promoting open debate on important controversies led to Justice Powell's pronouncement that an otherwise private individual involved in such a controversy might become a public figure "through no purposeful action of his own." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

Anticipating that unique fact settings would arise, *Gertz* deliberately set out "broad rules of general application" to be used by the lower courts in determining the stature of a plaintiff. *Id.* at 343–44. These guidelines have resulted in a uniform body of law on the public figure issue. Although petitioner contends that confusion has resulted, the cases reveal consistency in the standards applied and uniformity in the results. A review by this Court of the public figure doctrine is, therefore, unwarranted.

A. The Lower Courts Have Applied The Limited Purpose Public Figure Doctrine In A Uniform And Proper Manner.

Petitioner claims that the public figure doctrine is riddled with controversy and ambiguity. That claim is false. There are not, as he contends, "four distinct and mutually irreconcilable" interpretations of the doctrine. The courts have not drawn any such categories. Different individuals in different situations have qualified under the *Gertz* guidelines as limited purpose public figures; that these persons may be artificially pigeonholed into different categories does not mean that each category is exclusive of the other. Petitioner's claim, therefore, can be seen for what it is—an attempt to portray chaos where clarity exists.

Significantly, petitioner cites no case to support his claim that the limited purpose public figure doctrine is in disarray. The circuits which have addressed the issue have all adhered to the guidelines established in *Gertz* and followed by the court below.[4] The decisions are harmonious in both theory and application despite their many fact settings. This uniformity precludes the need for additional guidance. Quite noticeably, petitioner cites virtually no authority—judicial or academic—which seriously questions the workability of the *Gertz* principles. All of petitioner's ingenuity cannot conceal the fact that the familiar test announced in *Gertz*, now more than a decade old, simply does not cause problems in application.

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[4]*Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) (individual with important ties to organized crime is a limited public figure); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 106 S.Ct. 182 (1985) (individual connected with drug trafficking and who is subject of federal investigation is a limited public figure); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (chief executive officer of major corporation advocating marketing practices with great impact upon the public is a limited public figure); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir.), *cert. denied*, 440 U.S. 960 (1978) (developer connected with potential fraud involving a locally significant development is a limited public figure); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir.), *cert. denied*, 444 U.S. 931 (1978) (naval officer removed from his command is a limited public figure); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) (principal figure in debate concerning health hazards of flouridated water is a limited public figure); *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (4th Cir.), *cert. denied*, 460 U.S. 1024 (1982) (individual strongly advocating controversial military use of dolphins is a limited public figure).

See also Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 113 (1978); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Ethridge v. North Mississippi Communications, Inc.*, 460 F. Supp. 347 (N.D. Miss. 1978); *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975); *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984).

Even the cases petitioner relies upon are consistent with *Gertz*. *See Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981) (no public controversy where defendant manufactured claims that plaintiff mistreated animals); *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981) (individual with purely administrative duties in election campaign not central to the issues); *Schultz v. Reader's Digest Ass'n, Inc.*, 468 F. Supp. 551 (E.D. Mich. 1979) (acquaintance of Jimmy Hoffa not central to the issue of Hoffa's death).

B. The Decision Below Follows The Guidelines Set Forth In Gertz And Later Cases.

Under the decisions of this and other courts, it matters little whether Dameron voluntarily sought publicity. *Gertz* recognized that in "rare" situations an individual may "become a public figure through no purposeful action of his own." 418 U.S. at 345. An example is *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), in which plaintiff was accused of fixing college football games. Butts was found to be a public figure although he had never mounted a rostrum, had not sought publicity, and had not manufactured the controversy. Nevertheless, the magnitude of the issue and Butts' central role in it justified his status as a public figure.

The decision below rests upon one of those "rare" sets of facts contemplated by *Gertz*. Those unique facts include a public servant in a critical decision-making role who, through his action or inaction, became the principal figure in an important public controversy. Substantial publicity surrounded the crash of Flight 514, and Dameron himself was the subject of extensive publicity and testified at length concerning his activities as controller. By his own admission, the public recognized him as the subject of *The Washingtonian's* reference although the article does not mention him by name. These facts fall squarely within the ambit of *Gertz* and later decisions of this Court.

The decision below also expressly adheres to the public figure analysis set forth in *Gertz*: (1) whether an important public controversy existed; and (2) whether plaintiff played a central part in that controversy. Later decisions have clarified when these two components are satisfied. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979).

Firestone examined the question of whether the divorce of a Palm Beach socialite arose to the level of a "public controversy." Unlike *Butts*, the Firestone divorce was not an issue in which "the public has a justified and important

interest" and that "shapes events in areas of concern to society at large." *Butts*, 388 U.S. at 134, 164. Accordingly, this Court held that Mrs. Firestone's divorce was a matter of mere "interest" to the reading public. 424 U.S. at 454. In other words, the divorce of Mrs. Firestone, unlike the scandal involving Wally Butts, did not justify heightened media protection because it did not affect the public at large. Conversely, air safety greatly affects the public and is precisely the sort of controversy contemplated by *Butts* and *Firestone*.

The companion cases of *Hutchinson* and *Wolston* examined the other requirement of *Gertz*—the significance of an individual's role in a particular public controversy. In *Wolston*, plaintiff was charged with contempt for failing to appear before a grand jury investigating Soviet espionage. Although he was never indicted in connection with the investigation, plaintiff was referred to as a Soviet spy in *Reader's Digest*. He was not a public figure because his role in the espionage issue was "minor." 443 U.S. at 167. Thus, his mere association with the controversy did not automatically result in public figure status. *Id.* Similarly, the plaintiff in *Hutchinson* had not assumed "any role of public prominence" in the issue of government waste since he was merely a research scientist obtaining public grants who was singled out for unproductive work. 443 U.S. at 135. Public figure status, therefore, depends on whether the individual plays a central role in the controversy, as Dameron surely did in the crash of Flight 514.

Under this line of cases, petitioner's involvement in the controversy—voluntary or involuntary—does not lessen his central role in the ever-important issue of airline safety. His is one of those "rare" situations in which the gravity of the issues involved and the individual's important role in them require heightened media protection.

C. The Guidelines Established By This Court And Followed By The Lower Court Do Not Resurrect The "Public Interest" Test.

The unique facts necessary to meet this Court's limited purpose public figure guidelines belie petitioner's contention that "virtually any private citizen" will achieve public figure status. An important public controversy, not mere public interest, is necessary to achieve this status. In *Gertz*, this Court rejected the short-lived "public interest" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42–43 (1971), with the understanding that matters amounting to "public controversies" may still warrant heightened protection. Only matters of controversy, not just interest, receive heightened protection. To warrant that protection, the issue must "shape events in areas of concern to society at large." *Butts*, 388 U.S. at 164. This Court has consistently rejected attempts since *Gertz* to "equate 'public controversy' with all controversies of interest to the public." *Firestone*, 424 U.S. at 454. Petitioner's argument ignores this fundamental lesson.

This Court set forth clear guidelines in *Gertz* and *Firestone* concerning the definition of "public controversy," and the lower courts have applied these guidelines with uniform results. As a result, debate on fundamental issues, the goal of *New York Times*, has been "uninhibited, robust, and wide-open." Additional guidance on this well-understood doctrine is, therefore, unnecessary.

II.

THERE IS NO NEED FOR REVIEW BECAUSE PETITIONER IS A PUBLIC OFFICIAL OF CRITICAL IMPORTANCE TO THE PUBLIC.

A review of the decision below is also unnecessary because petitioner was a public official as well as a public figure. Petitioner achieved this status because of his impor-

tant responsibilities to the public as a government employee in a critical decision-making position. The judgment below was correct because Dameron—as either a public figure or a public official—had to show actual malice.[5]

Dameron fits clearly within this Court's definition of public officials. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), for example, this Court held that a supervisor of a county recreation area and ski resort was a public official. *Rosenblatt* held that the *New York Times* actual malice test encompasses a government servant with a position of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Id.* at 86.

Dameron's position as an air traffic controller employed by the Federal Aviation Administration falls squarely within this definition. The public has "an independent interest" in receiving information and fostering debate about the actions of air traffic controllers whose routine decisions bear directly upon the lives of countless individuals. That need is far greater than an undifferentiated general interest in public employee performance. The First Amendment demands that comment and debate upon such official conduct be free of undue self-censorship.

Dameron's status as a public official is clearly supported by numerous other decisions. Many types of government employees, such as policemen, medical examiners, naval officers, physicians, and tax assessors, have been held to be

[5]Alternatively, if this Court grants certiorari, a review of Dameron's status as a public official is fairly comprised within the public figure determination and is essential to a complete analysis of his status.

Dameron's status as a public official was not addressed substantively by the courts below. The Court of Appeals found it unnecessary to reach the question because it had already concluded that Dameron was required to prove actual malice as a limited public figure. Although the District Court stated that Dameron was not a public official, it did not explain the basis for that statement; Judge Greene merely ruled that "it is not necessary . . . to make a definitive decision on these matters." 575 F. Supp. at 1576.

public officials.[6] This wide variety of public officials reflects judicial perception of the public interest in subjecting to close scrutiny those who can act with the power of government to affect significantly our daily lives. Surely, it can be said of Dameron that "[t]he strong public interest in insuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official." *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981).

Thus, Dameron is a public official and must allege actual malice. He has not done so. The outcome below, therefore, was correct, and this Court should deny certiorari.

III.

THERE IS NO NEED FOR REVIEW BECAUSE A JURY COULD NOT FIND THAT RESPONDENTS ACTED WITH FAULT.

Even if petitioner somehow does not qualify as either a public official or a public figure, a review of the decision below would be improvident. In *Gertz*, this Court held that

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[6]*St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340 (3rd Cir. 1985), *petition for cert. filed*, No. 85–1593 (March 28, 1986) (police patrolman); *Fogus v. Capital Cities Media*, 111 Ill. App.3d 1060, 444 N.E.2d 1100 (1982) (police patrolman); *Hall v. Piedmont Pub. Co.*, 46 N.C. App. 760, 266 S.E.2d 397 (1980) (medical examiner); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir.), *cert. denied*, 444 U.S. 931 (1978) (former commander of a Navy vessel); *Green v. Northern Pub. Co.*, 655 P.2d 736 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983) (physician applying services to inmates); *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977) (tax assessor); *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) (social worker with power to remove child from parents' home).

liability may not be imposed without fault. 418 U.S. at 347. The record is barren of any evidence of fault, a lacuna which precludes the need for review.[7]

There simply is no evidence that respondents lacked a reasonable basis for writing and publishing the passage at issue. The article was accurate. The NTSB found that petitioner's actions contributed to the accident. Dameron admitted this at deposition. Because the article was truthful and accurate, respondents cannot have been negligent.

Despite the obvious accuracy of the article, petitioner now contends that it somehow misconstrues the NTSB findings. Even if the NTSB findings are subject to an alternative interpretation, petitioner still cannot prevail.

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), although an actual malice case, is nonetheless instructive here. This Court held in *Bose* that the publication of "one of a number of possible rational interpretations" of a report may preclude liability. Thus, even if the NTSB Report is capable of more than one reasonable interpretation, respondents cannot be liable for reporting the most obvious of interpretations. As Judge Greene found, the article "accurately reported the conclusions of the Board," 575 F. Supp. at 1577; a jury, therefore, could not find fault.

Not only were respondents without fault in publishing a reasonable interpretation of the NTSB Report, but Dameron failed to adduce any evidence which would permit a jury to find that respondents acted without due care in

[7]Alternatively, if this Court grants certiorari, a review of this question is essential to a complete analysis of this case.

The Court of Appeals held that it "need not reach the question" whether the article was "true as a matter of law." 779 F.2d at 743. Judge Greene, as discussed in note 3, *supra*, stated that the article "accurately reported the conclusions of the Board." 575 F. Supp. at 1577.

any other respect. The record clearly displays the substantial investigation and research that went into the article.[8]

Petitioner failed to produce any evidence of fault by respondents. The courts below did not substantively address this issue only because there were alternative grounds supporting their decisions. This Court should decline to review a result so manifestly correct.

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[8]Petitioner's contention that respondents were at fault in not reporting collateral litigation relating to the crash is wrong. There has been no showing that respondents were aware of the collateral litigation, or that respondents could possibly have found an unpublished memorandum opinion from the Eastern District of Virginia, an opinion captioned under names not directly related to the NTSB investigation. *Brock v. United States*, Civ. No. 77-479-A (E.D. Va. 1977). Any contention that respondents should have been alerted to the collateral litigation through newspaper articles which had appeared years earlier is frivolous.

In any event, the collateral litigation did not, as Dameron claims, exonerate him. Although the unreported opinion of the trial judge stated that there had been no primary negligence by the Government, the reported opinion of the Fourth Circuit expressly found it "unnecessary... to find whether there was any primary negligence on the part of the air traffic controllers at Dulles." *Brock v. United States*, 596 F.2d 93, 94 (4th Cir. 1979). Instead, plaintiffs failed in *Brock* because the contributory negligence of the TWA pilots was, under Virginia law, a complete bar to success on the merits.

Finally, litigation collateral to the crash has no relevance to the question of whether respondents were at fault in reporting the findings contained in the NTSB Report. No matter what the collateral litigation held, the NTSB found—and respondents correctly reported—that Dameron's activities were a contributing cause of the accident.

CONCLUSION

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

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April 30, 1986

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERLE W. DAMERON,
Petitioner,

v.

WASHINGTON MAGAZINE, INC.
LARRY VAN DYNE and DANIEL RAPOPORT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner is an "ordinary citizen" who "by sheer bad luck" became "involuntarily embroiled" in a "public controversy" (i.e., an airplane crash) in 1974. App. A at 9a; 11a-12a.[1] Eight years later petitioner was defamed by an article that appeared in *The Washingtonian* magazine on air traffic safety. App. A at 2a-3a. He subsequently sued for libel.

Although petitioner (a) did not "inject" himself into the 1974 air crash accident, (b) had no "desire" to be a part of the ensuing investigation, and (c) was "completely unknown" to the public prior to that event, the Court of Appeals nonetheless seized upon dicta in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345 (1974), to find that he was an "involuntary public figure." App. A at 9a; 10a; 11a. Accordingly, petitioner's burden of proof was escalated from simple negligence to the "almost impossible level" of the *New York Times* malice standard. *Dun & Bradstreet v. Greenmoss Builders*, —— U.S. ——, 105 S. Ct. 2939, 2952 (1985) (White, J., concurring). Because petitioner did not allege that *The Washingtonian* had published the disputed report with constitutional malice, his suit was dismissed. App. A at 14a.

Petitioner disputes his classification as an involuntary public figure. Moreover, he contends that the Court of Appeals' holding constitutes bad public policy which, unless reversed, will leave "hapless private citizens, who through no fault of their own are suddenly caught up in a public controversy . . . with virtually no recourse if defamed." Pet. at 22.[2] He has therefore sought this Court's review on:

> Whether the Court of Appeals' interpretation of the "involuntary public figure" doctrine is compati-

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[1] "App. A" citations refer to the Court of Appeals decision which is reproduced in Appendix A to the petition for certiorari at 1a-14a.

[2] "Pet. at ——" citations refer to the petition for writ of certiorari.

> ble with this Court's repeated insistence that an ordinary citizen may become a limited purpose public figure only by voluntarily engaging in purposeful activity which thereby increases the risk of media exposure and defamation.

Pet. at (i).

Respondents' Brief in Opposition [3] obscures rather than addresses this central issue. It repeatedly mischaracterizes petitioner's arguments, misstates relevant case holdings and dismisses out of hand the fundamentally irreconcilable divisions of opinion that have appeared within the federal and state judiciary on this question. It further raises extraneous legal questions regarding petitioner's purported "public official" status and the sufficiency of his evidence of respondents' fault that may only be properly disposed of on remand, following a review of the Court of Appeals' involuntary public figure holding.

Petitioner therefore replies to respondents' attempts to minimize the importance of this case and also comments briefly upon how this Court's recent decision in *Philadelphia Newspapers, Inc. v. Hepps*, 54 U.S.L.W. 4373 (U.S. Apr. 22, 1986) heightens the need for review of the substantial constitutional issues presented therein.

I. RESPONDENTS' BRIEF MISCHARACTERIZES THE CONSTITUTIONAL ISSUE ON WHICH PETITIONER SEEKS REVIEW, NAMELY, THE SCOPE AND VIABILITY OF THE INVOLUNTARY PUBLIC FIGURE DOCTRINE.

Respondents' Brief in Opposition repeatedly mischaracterizes the specific constitutional issue on which certiorari is sought: namely, "the proper scope and continuing viability of the involuntary public figure doctrine." Pet. at 10. Thus, for example, respondents variously contend that petitioner is asking this Court to revisit "the limited purpose public figure doctrine" *in toto*, Resp. Br. at 6, or is in some way "question[ing] the [overall] workability

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[3] Hereafter cited as "Resp. Br. at ——".

of the *Gertz* principles." *Id.* at 8. But however much it may suit respondents' purpose to suggest that petitioner has mounted a broad and undifferentiated challenge to the limited purpose public figure doctrine or is effectively requesting that *Gertz* be overruled, such is not the case. As demonstrated in the Petition, *Gertz* delineated three classes of public figures. Pet. at 12. It is the third and most ambiguous category—wherein Justice Powell hypothesized a class of involuntary public figures—about which further clarification is sought.

Because respondents are either unwilling or unable to make any distinctions among the three classes of public figures enumerated in *Gertz*, they are led to make a series of outlandish assertions. Respondents claim, for instance, that: "Significantly, petitioner cites no case to support his claim that the limited purpose public figure doctrine is in disarray." Resp. Br. at 8. But petitioner is making no such unbounded claim. To reiterate, certiorari is sought because of the substantial disagreement over the proper dimensions of the *involuntary* public figure doctrine.[4] Moreover, four and a half pages of petitioner's certiorari brief are given over to a discussion of over one dozen federal cases from the Second, Third, Fifth, Sixth, Seventh, Tenth and District of Columbia Circuits demonstrating the incongruous results engendered by regular application of the involuntary public figure doctrine. Pet. at 12-16. Respondents' brief makes no serious attempt to reconcile these inconsistencies.[5] Instead it

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[4] The "limited purpose public figure" category has been defined by this Court to comprise individuals who "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. It rests upon *voluntary* assumption of the risk of defamation. The *involuntary* limited purpose public figure category, as its name implies, does not. It is this distinction which continually eludes respondents in their opposition brief.

[5] Respondents' "response," such as it is, is to claim that "[d]ifferent individuals in different situations have qualified under the *Gertz* guidelines as public figures"—a proposition with which no

merely states what should be obvious, i.e., that all the circuit courts are attempting to "adhere to the guidelines established in *Gertz*," Resp. Br. at 8, and in place of any meaningful analysis offers a pointless string citation of cases. *Id.* at n.4.

Respondents also peremptorily assert that "virtually no authority—judicial or academic— . . . seriously questions the workability of the *Gertz* principles." But again, to the extent that respondents are inartfully using the term "*Gertz* principles" to signify the involuntary public doctrine—the only specific constitutional concept whose workability petitioner questions—this assertion is false. In addition to the numerous cases and legal commentators cited at pages 12-16 of the certiorari brief to substantiate this claim, petitioner also respectfully asks the Court to examine the legal authorities contained in the accompanying footnote.[6] The confusion is manifest.

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one, least of all petitioner, can disagree. Resp. Br. at 7. In making this unremarkable assertion, however, respondents fail completely to reply to petitioner's argument that different federal circuit courts construing the involuntary public figure doctrine with approximately *the same individuals* in approximately *the same situations* have reached glaringly inconsistent results both as to the doctrine's meaning and as to its scope. Pet. at 15-16.

[6] *See, e.g.*, Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1422-23 (1975) ("Despite [its] emphasis on voluntary exposure, the [*Gertz*] Court appeared to acknowledge . . . [an] involuntary public figure class. . . . The Court is speaking in riddles here."). Contrast Note, *Public Figures, Private Figures and Public Interest*, 30 Stan. L. Rev. 157, 170 (1977) ("the [involuntary public figure] possibly remains theoretical because the Court has confined its analysis to *voluntary* acquisition of public figure status.") with Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 Bus. Law. 709, 722-23 (1978) (stating involuntary public figure concept is being robustly applied). *See also* Comment, *Fame and Notoriety in Defamation Litigation*, 34 Hastings L. J. 809, 817 n.3 (1983) (stating that *Gertz's* involuntary public figure concept "seems to have been foreclosed by later opinions.")

The decisional law of this Court fares no better under respondents' indiscriminate analysis. For exmple on page 9 of their brief, respondents refer to the plaintiffs in *Curtis Publishing Co. v. Butts* as an appropriate model of the "involuntary public figure" hypothesized by *Gertz*. In fact, however, Justice Harlan's plurality opinion for the Court explicitly states that Butts' public figure status was achieved as the result of the "substantial amount of independent public interest [he commanded] at the time of the [defamatory] publication." 388 U.S. 130, 154 (1967). In other words, it was Butts' pervasive notoriety as a result of "his prior [voluntary] activities" in courting public attention that led to public figure status being imposed upon him. *Id.*

Similarly, respondents rewrite what they term "the public figure analysis set forth in *Gertz*," Resp. Br. at 9, to omit completely the Court's emphasis on the determinative role voluntary injection into a controversy plays in sacrificing an ordinary citizen's reputational rights to the general societal interest in robust debate on matters of public concern. *See Gertz*, 418 U.S. at 344-45. Last and perhaps most egregiously, *Firestone*, *Hutchinson* and *Wolston*—cases in which the Court's emphasis on voluntary action is manifest throughout—are collectively cited for the erroneous proposition that public figure status depends "on whether the individual plays a central role in [a public] controversy." Resp. Br. at 10.[7] Contrast, Pet. at 17-19.

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[7] Clearly, *Time, Inc. v. Firestone* reintroduced a "public controversy" element into the Court's limited purpose public figure test. 424 U.S. 448, 453 (1976). *See also* 424 U.S. at 487-89 (Marshall, J., dissenting from *Firestone*'s use of a "public controversy" element in this test as opposed to *Gertz*'s exclusive focus on "voluntariness"). But the existence or not of a public controversy was never intended by itself to increase the level of constitutional protection afforded a libel defendant. Rather it is properly viewed as an additional condition prerequisite so that if both voluntariness *and* a public controversy exist only then does an otherwise private figure libel plaintiff qualify as a public figure. *See generally*, Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 Va. L. Rev. 931, 940 (1983).

In sum, respondents offer nothing more than a series of unfounded mischaracterizations and tendentious case readings to support their contention that a review of the involuntary public figure doctrine is unwarranted.

II. RESPONDENTS RAISE EXTRANEOUS LEGAL CONSIDERATIONS THAT MAY ONLY BE PROPERLY ADDRESSED ON REMAND FOLLOWING RESOLUTION OF THE INVOLUNTARY PUBLIC FIGURE ISSUE.

Respondents claim that even if the Court of Appeals' classification of petitioner as an involuntary public figure was erroneous, review of that decision is unnecessary for two reasons. First, respondents argue that petitioner is a "public official" and would therefore still be required to prove constitutional malice, a burden which petitioner concedes he cannot surmount. Resp. Br. at 11-13. Second, respondents assert that even if petitioner is a private citizen, they were without fault in publishing the defamatory news report at issue. Resp. Br. at 13-15.

Petitioner does not dispute the sincerity of respondents' belief in either of these propositions.[8] What is disputed, however, is respondents' transparent attempt to place undeveloped factual issues before this Court that may only be properly addressed on remand following resolution of the involuntary public figure question. For although the record here adequately contains all the facts necessary to review the Court of Appeals' legal conclusion that petitioner is an involuntary public figure, the same may not be said of respondents' dubious "public official" or evidentiary claims.

Indeed, the district court considered and rejected respondents' claim that petitioner was a public official. *See*

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[8] However, this is not to suggest that he concedes either point. On the contrary, petitioner has vigorously and successfully contested respondents' attempts to have him classified as a public official throughout the course of this litigation. Moreover, petitioner maintains that ample evidence of respondents' negligence exists to support a jury verdict against them.

App. B [9] at 16a and fn. 3.[10] This holding was not addressed by the Court of Appeals which found no reason to reach this issue given its conclusion that constitutional considerations elevated petitioner to the status of an involuntary public figure. App. A at 14. Thus, the only authoritative judicial determination in this case to date belies respondents' claim that petitioner is a public official. Even assuming that that determination was, as respondents assert, not "definitive", Resp. Br. at 12, it would contravene long-standing principles regarding the orderly administration of justice for this Court to pass upon this issue before the lower courts were given the opportunity to make further factual findings regarding petitioner's public official status *vel non*. *See e.g.*, *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (where a federal court of appeals has misconceived the applicable constitutional law and has therefore failed to pass upon subsidiary factual questions, this Court's general practice is to remand the case to the lower court for consideration on the remaining issues).

In sharp contrast, the specific question on which petitioner seeks certiorari springs entirely from the Court of Appeals' unbridled extension of the "involuntary public figure" dicta in *Gertz*. This is a purely *legal* matter which, unless reviewed, will become embedded in the constitutional libel jurisprudence of the District of Columbia Circuit. Not only would such a result work a severe hardship on the legitimate reputational interests of private citizens residing in this jurisdiction but it would also resurrect the discredited *Rosenbloom* "public inter-

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[9] "App. B" citations refer to Appendix B to the petition for certiorari which contains the United States District Court Opinion below.

[10] The district court stated: "Contrary to defendants' assertion, not every individual performing work which 'citizens have entrusted to government' . . . [illegible] public official within the meaning of the defamation laws." Citing *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981); and *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

est" standard thereby perpetuating confusion in this area of the law. *See* Pet. at 20-22; *infra* at 9-10.

Respondents' second claim that no evidence of fault exists goes to the sufficiency of petitioner's evidence. Not only is this factual matter similarly undeveloped, but the district court reached the entirely opposite conclusion. It found that "there would be a[] [triable] issue of fact on the question whether defendants acted negligently" if petitioner had not been required to prove actual malice. App. B at 16a. In any event, both lower courts reviewed such evidence as was available at the preliminary summary judgment phase of this proceeding under the much more demanding actual malice standard of proof. Consequently, this contention is only appropriately disposed of on remand after this Court has had an opportunity to determine petitioner's proper constitutional status as either a private or public figure. *Cf., United States v. Donnelly Estate*, 397 U.S. 286, 295 (1970) (upon reversing appellate court and rejecting basis on which that court upheld district court's grant of summary judgment, this Court will remand case for further proceedings and will not rule on defendants' additional defenses which were not considered by either district or appellate courts).

III. THIS COURT'S RECENT DECISION IN *PHILADELPHIA NEWSPAPERS, INC.* v. *HEPPS* HEIGHTENS THE NEED FOR REVIEW OF THE INVOLUNTARY PUBLIC FIGURE ISSUE PRESENTED IN THIS CASE.

One month after certiorari was filed in this proceeding, a decision was released in the *Philadelphia Newspapers, Inc. v. Hepps* libel case. 54 U.S.L.W. 4373 (U.S. Apr. 22, 1986). At issue there was whether the common law presumption that defamatory speech is false should stand when a plaintiff seeks damages against a media defendant for speech of public concern. Fairly read, both majority and dissenting opinions add further support to petitioner's claim that the Court of Appeals' decision to

revitalize the involuntary public figure doctrine is in error.

For example, in its review of this Court's previous libel precedents, the majority opinion stresses that limited purpose public figure status is not achieved unless the putative libel plaintiff has "access to media channels useful for counteracting false statements" and has "not *voluntarily* placed [himself] in the public eye." 54 U.S.L.W. at 4374, citing *Gertz*, 418 U.S. at 341. (Emphasis added). *Hepps'* restatement that voluntary action, akin to assumption of risk, is the determinative factor in the limited purpose public figure equation supports petitioner's argument that the continuing viability of the *involuntary* limited purpose public figure doctrine is questionable. Pet. at 17-19. *See also Hepps*, 54 U.S.L.W. at 4378 (Stevens, J., dissenting) (private persons are "more deserving of recovery" because they have "relinquished no part of [their] good name[s]" by "thrusting themselves to the forefront of particular controversies. . . ." (citation omitted)).[11]

The certworthiness of this case is also exemplified by a careful reading of the *Hepps* dissent. There Justice Stevens, speaking for three other members of this Court (Justices Rehnquist, Burger and White) warned that the majority's willingness to extend constitutional protection to all speech of public concern would lead to a return of the "discredited analysis of the *Rosenbloom* plurality." 54 U.S.L.W. at 4379. *Cf.*, Petition at (i), Question 2. But the Court of Appeals' decision has already effectively reinstated the *Rosenbloom* plurality holding. Not only does it " 'tip [the scales] in favor of protecting . . . speech' . . . merely because that speech addresses 'matters of public concern,' " 54 U.S.L.W. at 4379 (citations omitted), but it would afford the maxi-

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[11] Thus as recently as two weeks ago *all* nine members of this court stressed voluntariness as the key element of limited purpose public figure status—an element completely disregarded by the lower court's decision.

mum amount of constitutional protection to a speaker (i.e, the actual malice privilege) merely because the speech at issue involved a "public controversy." *See generally*, Pet. at 20-22. Consequently, the need for review of that decision is paramount.

CONCLUSION

For the foregoing reasons and those stated in our initial Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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May 6, 1986